STATE OF MICHIGAN

COURT OF APPEALS

PATRICK GARDNER,

Plaintiff-Appellant,

v

MGM GRAND DETROIT, L.L.C.,d/b/a MGM GRAND DETROIT CASINO,

Defendant-Appellee,

and

OTIS ELEVATOR COMPANY,

Defendant.

UNPUBLISHED
January 24, 2006

No. 255360
Wayne Circuit Court
LC No. 03-300821-NO

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition in favor of defendant.[1] We affirm.

This negligence action arises from an incident where plaintiff fell while riding up an escalator at the MGM Casino in Detroit. On appeal, plaintiff argues that genuine issues of material fact exist regarding whether defendant had notice of the escalator malfunction, and also whether defendant's breach caused plaintiff's injuries. We disagree.

This Court reviews de novo the grant of a motion for summary disposition pursuant to MCR 2.116(C)(10). *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).

[1] As used in this opinion, "defendant" refers to defendant MGM. Plaintiff named Otis Elevator Company as a defendant in his first amended complaint, but only because defendant filed a notice identifying Otis Elevator as a nonparty at fault. Later, the trial court granted Otis Elevator's motion for summary disposition. No appeal of that order has been filed.

When deciding a motion for summary disposition, a court must consider the entire record in a light most favorable to the nonmoving party. *Id*. at 278. Our review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm,* 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Summary disposition is proper when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Corley, supra* at 278.

To establish a negligence claim, a plaintiff must show (1) that the defendant owed him a duty of care, (2) that the defendant breached that duty, (3) that the plaintiff was injured, and (4) that the defendant's breach caused the plaintiff's injury. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). A premises possessor is subject to liability for physical harm caused to his invitees by a condition on the land when he (a) knows, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001). A premises owner does not owe a duty to protect an invitee from a condition that cannot be anticipated. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 535; 542 NW2d 912 (1995).

Unless an unsafe condition of a premises is created by the active negligence of the possessor or his agents, a premises possessor owes a duty of care to invitees only if the condition "is of such a character or has existed a sufficient length of time that he should have had knowledge of it." *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001)(citations omitted). This Court looks at the character or the duration of the condition in order to determine whether defendant should have known that the condition existed, placing defendant on constructive notice. *Id*. Here, plaintiff failed to demonstrate that defendant had either actual or constructive notice of the condition.

In *Fuller v Wurzburg Dry Goods Co*, 192 Mich 447; 158 NW 1026 (1916), the plaintiff fell while riding up an escalator in the defendant's store. According to the plaintiff, a "peculiar motion" of the escalator threw her down. *Id*. at 447-448. Although two witnesses testified that the escalator had jerked on other occasions, there was no evidence that the defendant had known about the prior incidents. *Id*. at 448. The *Fuller* Court held that the plaintiff could not recover because there was no evidence that the defendant knew or could have known that an irregularity of the escalator's motion could or might occur and the plaintiff did not claim that the prior escalator malfunctions were brought to the defendant's attention. *Id*.

Recently, in *Walbridge v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued March, 3, 2000 (Docket No. 214007),[2] this Court affirmed the trial court's grant of summary disposition in favor of the defendant where the plaintiff was injured when he fell on an escalator at the Frank Murphy Hall of Justice. This Court noted that plaintiff presented no

[2] We recognize that an unpublished opinion is not binding precedent under the rule of stare decisis. MCR 7.215(C)(1).

evidence to suggest the defendant had notice that the escalator would malfunction, the defendant denied receiving any complaints about the escalator, the records of the service company maintaining the escalator did not indicate a problem, and the plaintiff and his witnesses did not realize there was a problem until already on the escalator. *Id*., slip op at 2-3.

Like the plaintiffs in *Fuller* and *Walbridge*, plaintiff has not presented any evidence that defendant had actual or constructive notice of the escalator condition. Plaintiff relied on a statement made to plaintiff and his friends after the incident, by an unidentified security guard, that the escalator had "problems" to show defendant had notice of the escalator malfunction. Additionally, plaintiff relied on deposition testimony by Michael Mitchell, an MGM employee, that he had investigated an escalator malfunction once before plaintiff's injury. But Mitchell did not identify which escalator he had investigated or when the prior investigation occurred. Further, Mitchell did not know what caused the escalator to stop while plaintiff was riding it or what caused the escalator he had previously investigated to stop.

While one can reasonably infer from this evidence that an escalator malfunctioned at some point in time before plaintiff's fall, this conclusion does not evidence that defendant had actual or constructive notice of the allegedly dangerous escalator condition. Plaintiff and his friend Quincy Jones testified that the escalator was not exhibiting any problem before it stopped while they were riding it. Plaintiff failed to present evidence of the dates or causes of prior malfunctions and what defendant could have possibly done to prevent the occurrences. Plaintiff admitted he could not produce any evidence explaining why the escalator stopped while plaintiff was riding it. Without evidence of why the escalator stopped while plaintiff was riding it, or evidence of when or why the prior escalator malfunction occurred, plaintiff failed to establish a genuine issue of material fact whether defendant had either actual or constructive notice that the escalator was defective or presented an unreasonable danger. *Fuller, supra* at 448; *Walbridge, supra* slip op at 3.

Finally, plaintiff now argues on appeal that if this Court finds the application of traditional theories of negligence unavailing he can invoke *res ipsa loquitur*. That doctrine is a rebuttable presumption or inference that a defendant was negligent that arises upon proof that the instrumentality causing a plaintiff's injuries was in the defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence. *Woodard v Custer*, 473 Mich 1, 6 n 2; 702 NW2d 522 (2005), quoting Black's Law Dictionary (6th ed); see, also, *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987).

Here, plaintiff has not presented any evidence of defendant's negligence. Even using *res ipsa loquitur* to infer negligence, plaintiff must produce some evidence of wrongdoing beyond the mere happening of the event. *Fuller, supra* at 448. In both *Fuller* and *Walbridge*, evidence that an escalator malfunctioned before the incident that injured the plaintiffs was not enough to prevent a grant of summary disposition in favor of the defendants. Neither of the plaintiffs in *Fuller* or *Walbridge* was able to demonstrate how the defendants were negligent. In the instant case, plaintiff has also failed to demonstrate how defendant was in any way negligent. While defendant had control over the escalator, there is no evidence that suggests defendant's

negligence caused the escalator to malfunction. So, *res ipsa loquitur* is not applicable to the case at bar.

We affirm.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey